

# **SUMMARY OF PUBLIC COMMENTS FOR 15-DAY PUBLIC COMMENT PERIOD AND THE BOARD'S RESPONSES**

## **I.**

### **Introduction**

The State Personnel Board (Board) proposes to adopt Section 547.60.2 of Title 2, Chapter 1, of the Code of Regulations (CCR). A second 15-day public comment period on this rulemaking action was held from October 30, 2020, through November 16, 2020. The comments received during the second 15-day public comment period were taken under submission and considered. A summary of those comments and the Board's responses are below.

## **II.**

### **Summary of Written Comments from Andrew Sturmfels, Deputy Director, Department of General Services (DGS)**

#### Comment I. Proposed Notice Period of Twenty (20) Calendar Days

The DGS argues that the proposed 20-calendar day notice requirement will cause significant delays in the execution and implementation of urgently required personal services contracts (PSC)'s and Small Business (SB) and Disabled Veteran Business Enterprise (DVBE) contracts which may ultimately result in more damage and/or cost to the state.

The DGS explains that state agencies' need for urgently required personal services may arise unexpectedly and that PSC's which do not specifically fall under the Government Code section 19132, subdivision (b)(1), emergency exemption will be drastically delayed by the proposed 20-calendar day notice period. As such, state agencies' ability to obtain vital services will be hampered and DGS' authority to move swiftly to mitigate any unexpected need that does not fall under the emergency exemption will be eviscerated.

In regards to SB and DVBE contracts, the DGS explains that the proposed 20-calendar day notice requirement would frustrate the legislative purpose of contracts awarded to SBs and DVBEs under the Small Business Procurement and Contract Act (Act). (Gov. Code, §14838.5; Public Contract Code, §§10335.5, subd. (c)(6), and 10340, subd. (b)(6).) The act is intended to assist SBs and DVBEs by increasing their participation in the state's contracting process. These contracts are procured through a streamlined process which can be completed quickly on a same day basis.

The proposed 20-calendar day notice requirement would also create an unnecessary delay in the contract process. This delay would place an additional burden on SBs and

DVBEs, many of which are already struggling and financially strapped, and whom depend on these contracts and the rapid payment of invoices for services rendered.

The DGS recommends the removal of the 20-calendar day notice period.

### **Response I.**

The Board thanks and appreciates DGS for its feedback to this regulatory package. The DGS presents compelling reasons why the 20-calendar day notice requirement is infeasible and may unnecessarily obstruct state agencies' immediate or urgent contracting needs.

The intent of the 20-calendar day notice requirement was to provide employee organizations a sufficient amount of time to perform meaningful reviews of PSC's prior to execution so that the state contracting agency does not enter into unjustified and/or wasteful contracts that are ultimately disapproved. However, the potential disruption to both state contracting agencies' operations and to SB/DVBE contracts caused by the 20-calendar notice requirement ultimately outweighs the benefits. Additionally, the removal of the 20-calendar notification requirement does not impede employee organizations ability to challenge PSC's at any time. (CA Gov. Code Section 19132, (a).)

As such, the Board will remove the 20-calendar notice period requirement. Additionally, the removal of the 20-calendar notice period requirement no longer necessitates that the state contracting agency provide the anticipated execution date of the contract and so this requirement will also be removed.

### **Comment II. Anticipated Date of Contract Execution**

The DGS also cautions against the use of the word "anticipated" in the proposed regulation: "in no less than 20 calendar days prior to the anticipated date of the execution of the contract." As described above, many of the contracts that DGS and other state agencies execute are the result of unanticipated service needs that are currently addressed under lawful, non-emergency, streamlined contracting processes. In such instances, the anticipated date of contract execution can be as soon as the request for a service contract can be processed, sometimes on the same day.

### **Response II.**

Please see I., Written Comments, Response (ante, at p. 1).

### Comment III. Amendments

The DGS states that state agencies are already required to provide notice of a contract prior to execution, pursuant to Government Code section 19132, subdivision (b)(1), as well as justification for contracting out pursuant to Government Code section 19130. State agencies are required to document, "with specificity and detailed factual information, the reasons why the contract satisfies one or more of the conditions set forth in Gov. Code section 19130(b)," pursuant to CCR, title 2, section 547.60. Once these requirements are met, and a contract is approved, the scope of work varies only if unanticipated, yet related, services are needed to meet the scope. Existing contracting procedures already sufficiently account for these variables.

In instances where option years to the contract term are anticipated, additional costs are evaluated at the time of bid evaluation, and the potential option years are disclosed in the copy of the original contract provided with notice prior to execution. Amendments of competitive-bid contracts to exercise option years at the sole discretion of the state already are permitted. (SCM 5.81A.1.a.) Requiring additional notice prior to the execution of amendments exercising option years would serve no legitimate business purpose.

The DGS recommends the removal of requiring notification prior to executing amendments because the requirement is redundant and not an efficient use of state resources.

### **Response III.**

The Board declines to incorporate these changes. Amendments to contracts may alter the scope and type of work significantly enough to require that unions be apprised of the amended contract in compliance with Government Code section 19132. In addition, while the original contract may not have been challenged by the unions because the proposed contract suggests that the services are required on an urgent, temporary, or occasional basis, subsequent renewals of the contract may be of concern to the unions considering that an extended reliance on personal services contracts that were originally believed to be urgent, temporary, or occasional in nature no longer holds true. Hence, requiring notices of amendments or renewals would be consistent with the intent and purpose of Government Code sections 19130 and 19132. Additionally, the requirement to notice employee organizations in the case of an amendment is not an undue administrative burden that would obstruct the execution of the PSC.

### Comment IV. Proposed Descriptive Notice Requirement Already Exists in the SCM

The DGS argues that the proposed regulation requiring that the notice include a description of the work to be performed under the contract, the anticipated value of the contract, the length of the contract, any extensions of the contract, and the employee organizations notified is unnecessary because the requirement already exists. Specifically, the DGS points out that the contract itself, a full copy of which must be

included in the notification according to CA Government Code section 19132, subdivision (b)(2), already provides a description of the work to be performed, the contract value, the contract length, and any options to extend the contract.

Additionally, the DGS informs the Board that the State Contracting Manual (SCM) section 7.05D.1.c.vi, already provides the following guidance to contracting agencies regarding notifications:

“Notifications should contain enough information to enable employee organizations to determine the type of work proposed, estimated value of the contract, bargaining units notified, term of the contract and the anticipated date the contract will be fully executed.”

The DGS contends that the proposed regulation would require that state agencies unnecessarily duplicate information already being provided pursuant to statute and DGS policy and as such the proposed notification requirements should be removed.

Response IV.

The intent of including the specified information in the notification was to require that appointing powers provide employee organizations a more succinct and clearer description of the PSC's scope to streamline the employee organization's review process. Employee organizations face a difficult task of reviewing thousands of PSC's and in many cases appointing powers fail to adequately provide specific, detailed information regarding the scope of the contract and the exact work to be performed outside of the contract itself. As such, employee organizations are unable to judiciously select specific contracts for timely and meaningful review, which is the obvious intent of notifying employee organizations in the first place.

However, the notification requirements outlined in the SCM section 7.05D.1.c.vi will ensure that employee organizations receive the necessary information to conduct judicious, timely, and meaningful review of PSC's.

As such, after further review and consideration, the Board will make the following changes to the proposed regulation in order to codify what are already existing requirements outlined in DGS policy:

“The notice shall include a copy of the full contract and enough information to enable employee organizations to determine the type of work to be performed under the contract, applicable exemption criteria under Government Code section 19130, subdivision (b), the estimated value of the contract, the term of the contract, and the employee organizations notified of the contract.”

### Comment V. Notification All Employee Organizations

The DGS states that they advise state agencies to notify employee organizations that “best fit” the type of work to be performed in the event that there is no bargaining unit corresponding to the work. This advice is consistent with Government Code section 19132, subdivision (b)(1), and with the third sentence of the proposed regulation as follows: “It is the contracting agency’s responsibility to identify the appropriate employee organization(s) to be notified.”

The DGS contends that a requirement to notify all employee organizations in the rare case that “best fit” cannot be determined would be an undue administrative burden on contracting state agencies. Further, it is not an efficient, tailored approach to providing appropriate notice of an imminent contract.

### **Response V.**

The Board does not find that the requirement to notify all unions when an appointing power “is unable to determine which employee organization(s) is or are appropriate to be notified, or determines that no represented employees perform or could perform the type of work that is called for within the contract” is an undue administrative burden on contracting state agencies. In most cases, contracting state agencies will not be required to notify all employee organizations since they will be able to make the determination as to which employee organization “best fits” the type of work to be performed.

Additionally, the Board’s concern that a contracting state agency may circumvent the union notification statutory requirement based on the justification that they were unable to determine a “best fit” for the type of work to be performed is valid.

Therefore, the Board declines to adopt this recommendation.